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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 350

JOSEPH M. CAIN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 1a-9a) is reported at 135 F. Supp. 516.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1956. The petition for a writ of certiorari was filed on August 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly held that no bona fide partnership recognizable for income tax pur-

poses existed between taxpayer and his son in the years 1943 and 1944 except during the period from October 30, 1944, to January 1, 1945.

STATUTE INVOLVED

The pertinent provisions of Sections 22, 181, 182, 322, and 3797 of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 9-12.

STATEMENT

The facts as found by the Court of Claims (Pet. 9a-18a) may be summarized as follows:

Since 1915, the taxpayer has been a licensed dentist practicing in Canton, Ohio. In that year, he became a partner of his father, Dr. H. O. Cain. The latter withdrew in 1941. However, the partnership name, Cain & Cain, was continued in use by the taxpayer who from time to time employed other dentists on a salary. (Pet. 9a-10a.)

Taxpayer's son, Dr. Charles C. Cain (hereinafter called Dr. Charles), was born in 1916, and taxpayer at all times thereafter anticipated Dr. Charles' entry into partnership with taxpayer in the practice of dentistry. (Pet. 10.)

Dr. Charles graduated from dental school in June 1942 and was admitted to practice in August 1942. While still in school, he had received a Navy commission as a probationary ensign. He was commissioned a lieutenant (j.g.) in the Navy on October 30, 1942, and was immediately called up for service. He left Canton on Navy duty on December 5, 1942. He was absent from Canton on Navy duty except for two or three brief leaves until October 26, 1944. (Pet. 10a.)

Soon after his admission to practice dentistry in Au-

gust 1942, Dr. Charles became a salaried employee of his father who was then operating under the name of Cain & Cain. His name was placed on the office door at that time. (Pet. 10a-11a.)

Sometime between September 1, 1942, and January 1, 1943, an undated partnership agreement was signed between taxpayer and his son, Dr. Charles. According to its terms taxpayer was to contribute all the capital and equipment in the business that he had been conducting in Canton, together with all the stock and merchandise of that business; and both parties were to give all their time, experience, and ability in the conduct and management of the business. (Pet. 11a.)

The contract by its terms was to become effective January 1, 1943. In the meantime, between August 1942, when he entered his father's office, and December 5, 1942, when he was called into the service, Dr. Charles had married and the contract provided that in the event of the son's death all the partnership property, including equipment, stock in trade, and all accounts and bank deposits, should immediately revert to and become the sole property of the taxpayer-father, and the son's estate would have no interest therein. And this provision was expressly made applicable to all the profits of the partnership at such time whether divided or not. (Pet. 11a.)

All three of the Cains (grandfather, father and son) were authorized to sign checks on the bank account of Cain & Cain; but, during the period from August 1942 until early November 1944, no checks were drawn on such bank account by Dr. Charles. (Pet. 12a-13a.)

From December 5, 1942, to October 30, 1944, Dr. Charles took no part in the operation or management

of Cain & Cain except for minor services during two or three brief leaves from the Navy. (Pet. 13a.)

On October 30, 1944, Dr. Charles, having returned from the service, practiced his profession with taxpayer in Canton, exercising all the rights, performing all the duties, and sharing equally in all profits of the business until August 1952 when his younger brother, Joseph, became an additional partner. (Pet. 13a.)

The original agreement between taxpayer and Dr. Charles had been cancelled in 1945 and a new agreement had been entered into providing for a new partnership between taxpayer and Dr. Charles without any restriction on Dr. Charles' interest in the income or assets of the firm. (Pet. 13a.)

The usual account books for a partnership were set up for Cain & Cain beginning January 1943, and such books were maintained during all times material herein. For the years 1943 and 1944, information returns of income were filed under the name of Cain & Cain showing income distributable one-half to taxpayer and one-half to Dr. Charles as co-partners. (Pet. 13a-14a.)

Taxpayer regularly filed his income tax returns for 1943 and 1944 and paid the taxes shown due thereon. He also caused to be filed similar income tax returns in the name of Dr. Charles and paid the taxes shown due thereon with checks chargeable to the drawing account of Dr. Charles in Cain & Cain. The returns reported the distributable income of Cain & Cain as being one-half taxpayer's and one-half Dr. Charles'. (Pet. 14a.)

The Commissioner determined that no bona fide partnership recognizable for income tax purposes existed between taxpayer and Dr. Charles in 1943 and 1944. He

taxed all the income to taxpayer and determined deficiences accordingly. (Pet. 14a.)

After payment of the deficiencies (Pet. 15a), taxpayer brought this suit for refund in the Court of Claims. The Court of Claims sustained the Commissioner's determination except for the short period from October 30, 1944, to January 1, 1945, during which it found that a real partnership existed. (Pet. 8a-9a.)

ARGUMENT

The basic question in the Court of Claims was whether there was a valid partnership for income tax purposes in 1943[1] and 1944; and the Court of Claims held there was not, except for the last two months of 1944. Taxpayer has apparently accepted the decision as to 1943 and confines his present contention to 1944, urging (Pet. 2, 5) that absence of a partner on military service is not a proper ground for denying recognition to a partnership or splitting its tax year; and that since the son, Dr. Charles, was serving in the Navy during the first ten months of 1944 and actually rendered services in the last two months of that year, there was consequently a valid partnership for the entire year and no basis for taxing any portion of the son's share of partnership income to the father.

The difficulty with taxpayer's contention is that it assumes that there was a valid partnership prior to the son's entry into service. This assumption is contrary

[1] In the Court of Claims, the Commissioner also contended that taxpayer's claim for refund was not timely filed as to $19,347.46 of the 1943 deficiency. Discussion of this contention appears unnecessary in the present brief. In view of its disposition of the case, holding that there was no valid partnership in 1943, the Court of Claims did not reach the question. And, in his petition for certiorari, taxpayer appears to have abandoned any claim as to 1943.

to the holding of the court below. The Court of Claims was not unmindful of the rule that one who has been a bona fide partner does not lose that status when he is called into military service (*Commissioner* v. *Culbertson*, 337 U. S. 733, 739, n. 6), but it was also aware of the correlated proposition that one hardly becomes a partner in the conventional sense merely because he might have done so had he not been called. (Pet. 5a.) And the Court of Claims, after carefully reviewing the facts, found that there was no real partnership in this case until after the son returned from service in October 1944. (Pet. 7a-9a.) Until that time, as the Court of Claims concluded (Pet. 7a), "Both plaintiff and his son knew that he would not be able to make any contribution to the partnership as such * * *".

In the circumstances, there is no adequate basis for taxpayer's assertion (Pet. 6-8) of conflict with *Blumberg* v. *Commissioner*, 11 T. C. 663 (Acquiescence, 1949-1 Cum. Bull. 1), and *Crossley* v. *Campbell*, 184 F. 2d 639 (C. A. 7th. In each case, prior to the entry of the son into the military service, the partnership had already been actually formed and the son had already rendered substantial services to the business. See *Bellamy* v. *Commissioner*, 14 T. C. 867; *Tindall* v. *Commissioner*, 14 T. C. 1120, 1126 (Acquiescence, 1950-2 Cum. Bull. 4). In the present case, as already pointed out, both taxpayer and his son knew that he would not be able to make any contribution to the partnership as such until after his return from service, and until then the contract was wholly executory. (Pet. 7a-8a.)

Nor is there any conflict, as petitioner alleges (Pet. 10-13), between the decision below and *Commissioner* v. *Culbertson*, 337 U. S. 733. There this Court held

(pp. 744-745) that the validity of a family partnership for tax purposes should be sustained "If, upon a consideration of all the facts, it is found that the partners joined together in good faith to conduct a business, having agreed that the services or capital to be contributed *presently* by each is of such value to the partnership that the contributor should participate in the distribution of profits * * *" (emphasis added). The Court also said (p. 740):

> * * * The intent to provide money, goods, labor, or skill sometime in the future cannot meet the demands of §§ 11 and 22(a) of the Code that he who presently earns the income through his own labor and skill and the utilization of his own capital be taxed therefor. The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income.

Here, "upon a consideration of all the facts", the Court of Claims found that no present contribution to the partnership by the son was contemplated by the parties when they executed the partnership agreement and that they knew the son could not make any such contribution until he returned from the Navy. Thus, applying the *Culbertson* test, the court below correctly concluded that prior to October 30, 1944, the purported partnership did not exist in any real sense.[2] In any event, no reason

[2] It follows, as the court below held, that the only 1944 income of the firm that could be divided between father and son for tax purposes is the income allocable to the period beginning October 30. Sections 47(g) and 48(a), Internal Revenue Code of 1939. Petitioner's argument to the contrary (Pet. 9-10)—that the 1944 taxable year cannot be so divided—is based on the erroneous assumption that a genuine partnership was formed in 1942.

appears for review by this Court of this essentially factual issue.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1952 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) [as amended by Sec. 150(g)(1)(A) of the Revenue Act of 1942, c. 619, 56 Stat. 798] As part of his gains and losses from sales or exchanges of

capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. 1952 ed., Sec. 182.)

SEC. 322. REFUNDS AND CREDITS.

(a) [as amended by Sec. 172(e)(1) of the Revenue Act of 1942, *supra*] *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or

refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) [as amended by Sec. 169(a) of the Revenue Act of 1942, *supra*] *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.

(B) If a claim was filed, and (i) no return was filed, or (ii) if the claim was not filed within three years from the time the return was filed by the taxpayer, during the two years immediately preceding the filing of the claim.

(C) If no claim was filed and the allowance of credit or refund is made within three years from the time the return was filed by the taxpayer, during the three years immediately preceding the allowance of the credit or refund.

(D) If no claim was filed, and (i) no return was filed or (ii) the allowance of the credit or refund is not made within three years from the time the return was filed by the taxpayer, during the two years immediately preceding the allowance of the credit or refund.

* * * * *

(26 U.S.C. 1952 ed., Sec. 322.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(26 U.S.C. 1952 ed., Sec. 3797.)

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